A

DATO' SERI DR MUHAMMAD SHAFEE ABDULLAH v. MAJLIS PEGUAM

COURT OF APPEAL, PUTRAJAYA
TENGKU MAIMUN TUAN MAT JCA
AHMADI ASNAWI JCA
B VERNON ONG LAM KIAT JCA
[CIVIL APPEAL NO: W-01-49-01-2014]
23 JULY 2015
[2015] CLJ JT(12)

C ***LEGAL PROFESSION:*** *Practice of law – Misconduct – Publicity – Newspaper articles on appellant and his profession as advocate and solicitor – Remarks and allusions made thereof – Whether laudatory – Whether beyond scope of 'approved information' allowed by law – Whether in breach of rules against publicity – Legal Profession (Publicity) Rules 2001 rr. 2, 5, 15, 24 – Legal Profession (Practice and*
D *Etiquette) Rules 1978 r. 48 – Legal Profession Act 1976 s. 94(3)(k), (o)*

WORDS AND PHRASES: *'approved information' – Rules 2(g) and (m), Legal Profession (Publicity) Rules 2001 – Scope of*

WORDS AND PHRASES: *'in the opinion of the Bar Council' – Rule 15, Legal*
E *Profession (Publicity) Rules 2001 – Whether to be construed narrowly*

The appellant, an advocate and solicitor, was alleged to have breached the Legal Profession (Publicity) Rules 2001 ('the Rules') and fined RM5,000 by the respondent's Disciplinary Board ('DB'), when, following an interview that he has had with a journalist, two articles were published in The Star
F newspaper on 27 September 2009 alluding to remarks such as 'high profile lawyer', 'top lawyer', 'whenever I am a defence counsel, the AG's Chambers always send their best team against me', 'I am an authority on election law' and 'I am one of the world's experts on extradition and mutual assistance cases'. It was the respondent's case, in invoking the disciplinary sanction on
G the appellant, that the remarks as appeared in the articles were an advertisement and laudatory in nature, that they went beyond the scope of 'approved information' as defined in r. 2 of the Rules and that they had therefore transgressed the provisions of rr. 2, 5 and 15 of the Rules. The appellant appealed to the High Court against the DB's decision and on being
H unsuccessful thereat, appealed further. Before the learned Justices of the Court of Appeal herein, the appellant argued that part of the words complained of were not his but the journalist's, that the remarks were not laudatory, and in any case that he could not, upon the proper construction of the relevant provisions of the Rules, be said to have publicised himself and his law firm.

I

Held (allowing appeal; ordering refund of penalty sum)
Per Vernon Ong Lam Kiat JCA delivering the judgment of the court:

(1) The words describing the appellant as a top and high profile lawyer in the first article were the journalist's own remarks, as were the remarks relating to people finding the appellant's office without any signboard because of the appellant's reputation. Such remarks, being the journalist's personal opinion, could not be ascribed to the appellant as being laudatory and in contravention of r. 5 of the Rules. In any case, there was no evidence to show that the appellant had solicited the interview, or wanted to publicise himself. (para 15)

(2) The two statements in the second article (AG's Chambers sending their best team against him and he being an expert in election law, extradition law and mutual assistance cases) were made with respect to the scope of the journalist's questions and were not laudatory remarks within the meaning of r. 5 or 15 of the Rules. The statements were made in the course of an extensive and long interview and in response to questions about the criminal justice system and the appellant's preference insofar as work was concerned. The appellant was right in contending that, read in that light, the reference to his expertise in election law, extradition law and mutual assistance in criminal matters could fall under 'approved information' under r. 2(m) and r. 2(g) of the Rules. (paras 18-20)

(3) The phrase 'in the opinion of the Bar Council' in r. 15 of the Rules should not be narrowly construed. As stated in *Gana Muthusamy v. Tetuan LM Ong & Co*, it is primarily for members of the Bar to decide what amounts to misconduct. However, while it is for the Bar Council, the DB or the Disciplinary Committee to interpret the provisions of the rules, the final arbiter on the interpretation is the court. (para 22)

(4) The court, in interpreting the provisions of the Rules to determine whether there is any breach thereof, will apply the objective test and place itself as far as possible as members of the Bar. It follows that the fact that a statement is laudatory, in itself, does not automatically lead to the conclusion that there has been publicity within the meaning of the Rules. The statement must be read within the context of the entirety of the articles and surrounding circumstances. In the present case, looking at the statements objectively and in the context in which they were made, there was no publicity within the meaning of the Rules. The appellant, hence, had not breached the Rules. (paras 23 & 24)

Bahasa Malaysia *Translation Of Headnotes*

Perayu, seorang peguambela dan peguamcara, telah didapati melanggar Peratutan-Peraturan (Publisiti) Profesion Undang-Undang 2001 ('Peraturan') dan didenda RM5,000 oleh Lembaga Disiplin responden ('LD') apabila, ekoran satu temubual yang diadakan antara beliau dengan seorang wartawan, dua artikel yang mengandungi komen-komen seperti 'peguam berprofil

A tinggi', 'peguam terkemuka', 'bilamana saya menjadi peguambela, pihak Jabatan Peguam Negara akan menghantar pasukan terbaik mereka untuk melawan saya', 'saya adalah autoriti bagi undang-undang pilihanraya' dan 'saya adalah antara pakar di dunia ini berhubung perkara ekstradisi dan kes-kes bantuan mutual' telah disiarkan di dalam akhbar The Star pada
B 27 September 2009. Adalah menjadi kes responden, dalam mengenakan hukuman disiplin ke atas perayu, bahawa kata-kata seperti yang tersiar di atas adalah satu pengiklanan dan bersifat memuji, bahawa ianya terkeluar daripada skop 'maklumat dibenarkan' seperti yang tertera di bawah per. 2 Peraturan dan kerana itu melanggar peruntukan-peruntukan per. 2, 5 dan 15
C Peraturan. Perayu merayu ke Mahkamah Tinggi terhadap keputusan LD dan apabila tidak berjaya di situ, merayu seterusnya. Di hadapan yang arif hakim-hakim Mahkamah Rayuan, perayu menghujahkan bahawa sebahagian daripada kata-kata yang dirunguti bukan kata-katanya tetapi kata-kata wartawan berkenaan, bahawa kata-kata tersebut tidak bersifat memuji, dan
D walau apapun, bahawa, berdasarkan tafsiran betul peruntukan-peruntukan Peraturan, beliau tidak boleh dikatakan sebagai telah melakukan publisiti mengenai diri dan firma guamannya.

Diputuskan (membenarkan rayuan; memerintahkan pemulangan wang penalti)

E **Oleh Vernon Ong Lam Kiat HMR menyampaikan penghakiman mahkamah:**

(1) Perkataan-perkataan yang memperikan perayu sebagai seorang peguam terkemuka dan berprofil tinggi dalam artikel pertama adalah kata-kata wartawan tersebut, sepertimana juga kata-kata bahawa walaupun pejabat
F perayu tidak ada papan tanda, orang ramai masih boleh mencarinya disebabkan reputasi perayu. Kata-kata ini, kerana datangnya daripada wartawan tersebut, tidak boleh dikaitkan dengan perayu dengan menganggapnya sebagai kata-kata pujian yang melanggar per. 5 Peraturan. Apapun, tiada bukti yang menunjukkan bahawa perayu
G meminta ditemubual dan ingin mengiklankan dirinya.

(2) Dua kenyataan dalam artikel kedua (Jabatan Peguam Negara menghantar pasukan terbaiknya untuk menentang perayu dan perayu seorang pakar dalam undang-undang pilihanraya, undang-undang ekstradisi dan kes-kes bantuan bersama) dibuat dalam skop pertanyaan-
H pertanyaan yang dikemukakan oleh wartawan dan bukan kata-kata pujian seperti yang dimaksudkan oleh per. 5 atau 15 Peraturan. Kenyataan-kenyataan ini dibuat semasa sesi temubual yang panjang lebar dan sebagai menjawab soalan-soalan mengenai sistem keadilan jenayah serta kecenderungan perayu berkaitan dengan kerjanya. Perayu betul
I dalam hujahannya bahawa, dibaca dari sudut ini, rujukan kepada kepakaran beliau dalam bidang undang-undang pilihanraya, undang-undang ekstradisi dan bantuan mutual dalam hal-hal jenayah boleh dirangkumi oleh terma 'approved information' di bawah per. 2(m) dan per. 2(g) Peraturan.

(3) Ungkapan pada pendapat Majlis Peguam di dalam per. 15 Peraturan tidak boleh ditafsir secara sempit. Seperti yang dikatakan di dalam *Gana Muthusamy v. Tetuan Lim Ong & Co*, adalah untuk ahli-ahli Majlis Peguam untuk menentukan apa yang membentuk salahlaku. Namun begitu, walaupun menjadi tugas Majlis Peguam, LD atau Jawatankuasa Disiplin untuk mentafsir peruntukan-peruntukan Peraturan, pengadil terakhir bagi tafsiran-tafsiran tersebut adalah mahkamah.

(4) Mahkamah, dalam mentafsir peruntukan-peruntukan Peraturan bagi menentukan sama ada terdapat apa-apa pelanggaran terhadapnya, akan mengguna pakai ujian objektif dan sedapat mungkin meletakkan dirinya di tempat ahli-ahli Majlis Peguam. Dengan itu, fakta bahawa sesuatu kenyataan bersifat memuji semata-mata tidak semestinya menjurus kepada rumusan bahawa terdapat publisiti seperti yang dimaksudkan oleh Peraturan. Kenyataan perlu dibaca dalam konteks keseluruhan artikel dan hal keadaan. Dalam kes semasa, menimbang kenyataan-kenyataan secara objektif, dan dalam konteks ia dibuat, tidak wujud publisiti seperti yang dimaksudkan oleh Peraturan. Perayu dengan itu tidak melanggar Peraturan.

Case(s) referred to:
Gana Muthusamy v. Tetuan LM Ong & Co [1998] 4 CLJ 878 CA ***(refd)***

Legislation referred to:
Legal Profession Act 1976, ss. 94(3)(k), (o), 103E
Legal Profession (Practice and Etiquette) Rules 1978, r. 48
Legal Profession (Publicity) Rules 2001, rr. 2(g), (m), 5(1)(b)(vi), 15(1)(b), (2), 24

For the appellant - Muhammad Shafee Abdullah (Sarah Maalini Abishegam & Mohd Farhan with him); M/s Shafee & Co
For the respondent - Arthur Wang Ming Way (Nurufarhina Ab Rahim with him); M/s Arthur Wang, Lian & Assocs

[Editor's note: Appeal from High Court, Kuala Lumpur; Civil Suit No: 17-59-11-2012 (overruled)]

Reported by Wan Sharif Ahmad

JUDGMENT

Vernon Ong Lam Kiat JCA:

Introduction

[1] This appeal relates to the decision of the High Court given on 10 January 2014 dismissing the appellant's appeal and upholding the decision of the Disciplinary Board (DB) dated 5 October 2012 to impose a penalty of RM5,000 on the appellant.

[2] On 23 September 2010, the Bar Council wrote to the DB complaining that the appellant appears to have breached the Legal Profession (Publicity) Rules 2001 (2001 rules). The complaint is based on an interview given by the appellant which appeared in two articles in The Star newspaper dated 27 September 2009.

[3] The Disciplinary Committee (DC) which conducted an inquiry into the complaint concluded that the appellant had in his interview with the journalist publicised himself and his firm of solicitors in breach of rr. 2, 5(1)(b)(vi), 15(2) and 24 of the 2001 Rules, r. 48 of the Legal Profession (Practice and Etiquette) Rules 1978 and Ruling 14.01(2) of the Rules and Rulings of the Bar Council 2007. The DC found the appellant guilty of misconduct contrary to s. 94(3)(k) and (o) of the Legal Profession Act 1976 (LPA 1976) and recommended a fine of RM5,000 be imposed on the appellant.

[4] By a letter dated 15 October 2012, the DB informed the appellant that it had affirmed the finding of liability and recommendation on punishment by the DC and ordered that a fine of RM5,000 be imposed on the appellant. The appellant appealed to the High Court against the decision of the DB under s. 103E of the LPA 1976.

[5] The first article entitled "Counsel Rests His Case" contained the words "high profile lawyer", "top lawyer" and "people had no difficulty finding the appellant's office (which had no signboard) because of the appellant's reputation". The learned judge found that the words in the first article were that of the journalist and not of the appellant.

[6] The second article entitled "Keeping Within The Letter Of The Law" contained two statements which were made by the appellant. The two statements which form the subject of the complaint are:

> I can tell you that whenever I am a defence counsel, the AG Chambers always send, without a doubt, their best team against me. This is true.
>
> I am an authority in election law and there are very few of us in this country. I am also one of the world's experts on extradition and mutual assistance cases.

[7] In dismissing the appellant's appeal, the learned judge held that the two articles contained laudatory remarks and statements about the appellant and his firm which were beyond the scope of "approved information" allowed by the 2001 Rules. The learned judge also held that the opinion of the Bar Council under r. 15(1)(b) of the 2001 Rules is the primary consideration insofar as it relates to the question as to whether what was said at the interview will reasonably give rise to an inference that the appellant is attempting to publicise his practice.

Submission Of Parties

[8] The essence of the appellant's argument may be summarised as follows:

(a) the words contained in the first article were the journalist's own opinion;

(b) he did not publicise himself and his firm; and

(c) the two statements in the second article are not laudatory statements.

[9] On the first ground, the appellant argued that the words published in the first article were not his statements and as such he could not have been said to have advertised himself and his firm. As such, it was impossible for him to withdraw the first article.

[10] On the second ground, the appellant argued that the word "publicise" in r. 5 of the 2001 Rules means to make known to the public through any form of advertisement. As r. 5 must be read and taken to refer to advertisements made for the purposes of publicity, there must be an advertisement to promote the sale of that which is being advertised. In this instance, the appellant argued that there was no advertisement at all. Merely mentioning that one is a specialist or has expertise in answer to a question by a journalist is not publicity. The appellant also referred to numerous instances to support his argument that no action has been taken by the Bar Council against other advocates and solicitors whose practice and firms are being "lauded" and praised.

[11] On the third ground, the appellant argued that the two statements must be read in the context of the second article as a whole. He submitted that his references to judges who had presided over his previous cases were given in a neutral, totally non-contemptuous way. The interview was to address certain public perceptions that were wrongly held and generally educational to the general public. The testimony of the journalist was wholly disregarded by the DC, DB and the learned judge. In the circumstances, the appellant's intention is relevant with respect to the fact of what the journalist had asked in her scope of questioning him, what was her purpose of the interview and what was the general message that came out from reading the article.

[12] In reply, learned counsel for the Bar Council argued that the references to previous cases and judges are irrelevant. The whole point of the 2001 Rules is simply that one cannot say that one is good. It is sufficient to show that the appellant described himself as an authority and an expert; the appellant's intention is irrelevant. The two statements are laudatory remarks uttered by the appellant. In making the statements, the appellant had allowed information beyond the scope of "approved information" as defined under r. 2 of the 2001 Rules to be publicised with regard to his practice and firm. The said rule expressly prohibits an advocate and solicitor when engaged in an interview with the press, radio or television from divulging information other than the "approved information".

[13] Learned counsel for the Bar Council also argued that courts must exercise caution when entertaining an appeal in which the central question is whether a particular conduct is unprofessional and cases meriting curial interference will be rare. It is primarily for the members of the Bar to decide what amounts to conduct unbecoming of an advocate and solicitor in particular circumstances, according to standards established by members of that honourable profession (*Gana Muthusamy v. Tetuan LM Ong & Co* [1998] 4 CLJ 878; [1998] 2 MLRA CA 208, 209).

Decision Of The Court

[14] Upon perusing the entirety of the two articles in question, we are inclined to agree with the appellant's argument that the statements must be read in the context of the articles as a whole.

[15] In the first instance, we agree with the learned judge that the words describing the appellant as a top and high profile lawyer in the first article were the journalist's own remarks; as are the journalist's remarks relating to people finding the appellant's office (without any signboard) because of the appellant's reputation. We take the view that the said remarks reflected the journalist's personal opinion. It was something which the appellant could not have prevented the journalist from expressing. At any rate, we are not satisfied that there is any evidence to show that the appellant solicited the interview or that the appellant wanted to publicise his practice or his firm. In the circumstances, the words in question cannot be ascribed to the appellant as being laudatory and in contravention of r. 5 of the 2001 Rules.

[16] We now turn to the two statements in the second article. We agree with the submission of the appellant that the statements in question were made with respect to the scope of the journalist's questions.

[17] It is apparent from a perusal of the second article that the appellant's views were solicited on a variety of topics including the following:

(i) SUHAKAM, Batu Buruk, inquiries and conflict of interest; and

(ii) high profile cases, the secret to court victories and the AG's post.

[18] The first statement relating to the AG's Chambers always sending their best team against the appellant was made in response to allegations that the appellant won his cases because of shoddy police investigations or weak prosecution. The appellant submitted that he wanted to impress upon the journalist that he did not win cases simply because his opponent played dead; but that the criminal justice system was at its best, at least in his cases. The appellant also submitted that the cases he was involved were controversial and of public interest and that the two problems did not exist. The police had investigated well and the best prosecutors were involved in all of his cases to prosecute these cases.

[19] The second statement relates to the appellant being an authority in election law and an expert on extradition and mutual assistance cases. According to the appellant, the statement was made in answer to questions about whether the judiciary was corrupt. He came up with an explanation that though it was at one time, it is no longer the case. In particular, the second statement was in response to the journalist's remarks that the appellant take on cases ranging from murder, corruption, to defending the underworld "kings"; and to the question whether the appellant have a preference. In answer to the question, the appellant alluded to his stint as a prosecutor and to the cases undertaken and the type of work with references to the specialised areas in which he practices including election law and extradition and mutual assistance cases.

[20] We have perused the second article and are of the view that the statements in question are not laudatory remarks within the meaning of rr. 5 or 15 of the 2001 Rules. The statements were made in the course of an extensive and long interview and in response to questions about the criminal justice system and the appellant's preference insofar as work was concerned. We agree with the appellant's submission that read in that light, the references to his expertise in election law and extradition law and mutual assistance in criminal matters can to a large extent fall under "approved information" under r. 2(m) and 2(g) of the 2001 Rules.

[21] Disciplinary proceedings are quasi penal in nature. The DB has the power to impose any one or more of the following penalties or punishments:

(i) to be struck off the Roll;

(ii) to be suspended from practice for up to five years;

(iii) to be ordered to pay a fine of up to RM50,000; or

(iv) to be reprimanded or censured.

[22] In this regard, we do not think that the phrase "in the opinion of the Bar Council" in r. 15 of the 2001 Rules should be construed narrowly. As stated in *Gana Muthusamy v. Tetuan LM Ong & Co (supra)* it is primarily for the members of the Bar to decide what amounts to misconduct and this is reflected in the written rules of the legal profession. In this regard, it is for the Bar Council, the DB or DC to interpret the provisions of the rules. The final arbiter on the interpretation of the rules is the court. In interpreting the provisions of the rules, the court will apply the objective test. The court will place itself as far as possible as members of the Bar in order to determine whether there is any breach of the rules.

[23] In other words, the fact that the statements are laudatory in itself does not automatically lead to the conclusion that there has been publicity within the meaning of the 2001 Rules. The statements must be read within the context of the entirety of the articles and surrounding circumstances. The other factors which the DC and DB ought to have considered are: (i) the

A intention of the appellant with respect to the fact of what the journalist had asked in her scope of questioning him; (ii) the intention of the journalist as to the purpose of the interview; and (iii) the general message that came out from reading the articles.

B **[24]** Accordingly, looking at the statements in question objectively and in the context of which they were made, we are of the view that there was no publicity within the meaning of the 2001 Rules. Accordingly the appellant did not breach the 2001 Rules. Therefore, the appeal is allowed. We order that the penalty paid by the appellant to be refunded. We make no order as to costs.

C

D

E

F

G

H

I